

October 12, 2005

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Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: WC Docket No. 04-30 – Emergency Request for Declaratory Ruling – Additional  
Ex Parte Filing By Gemini Networks CT, Inc. (“Gemini”)**

Dear Ms. Dortch:

Gemini files this additional *ex parte* filing to make the Commission aware of recent developments relating to the details of undisclosed negotiations between Commissioner Jack R. Goldberg of the Connecticut Department of Public Utility Control (“DPUC”) and SBC Connecticut (“SBC”) to secretly resolve the substance of this proceeding through a special state legislative provision that ultimately was vetoed by the Governor of Connecticut.

In previous *ex parte* filings, on June 24, 2005 and July 11, 2005, respectively, Gemini provided information concerning legislation adopted by the Connecticut General Assembly related to the facilities which are the subject of this docket and prior DPUC decisions, which were filed and supported by DPUC comments filed herein, requiring those facilities to be made available to Gemini. Press reports of the prelude to that legislation referred to a “memorandum of understanding that was drafted before the bill was passed but never disclosed to legislators.”<sup>1</sup> After the bill was enacted, in large part because of the secretive, last minute dealings between Commissioner Goldberg and SBC, Governor Jodi Rell vetoed the bill.<sup>2</sup>

Although there were denials that such a memorandum of understanding (“MOU”) ever existed, Gemini is filing herewith a copy of that MOU, along with other materials that have now been forwarded by Gemini’s counsel to the Associate Legal Counsel, Office of the Governor, and the Attorney General of Connecticut. These materials were produced in partial response to Gemini requests made under Connecticut’s version of the Freedom Of Information Act.

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<sup>1</sup>“Small Firm Cries Foul Over Bill Aiding SBC,” Hartford Courant, June 23, 2005, attached to Gemini *ex parte* filing dated June 24, 2005.

<sup>2</sup> See Veto Message, dated July 11, 2005, attached to Gemini *ex parte* filing dated July 11, 2005.

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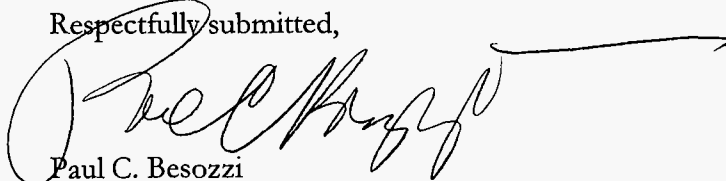
These documents confirm that Commissioner Goldberg and SBC, one of Connecticut's largest utility contractors, were working on a behind-the-scenes deal that as a practical matter would have resulted in the termination of this ongoing docket, while absolving SBC from any need to comply with the prior DPUC decisions requiring that Gemini be given access to the facilities that had been abandoned by SBC long ago. At the same time, the DPUC continued to maintain herein that its decisions were correct and the FCC should not preempt them. Indeed, at one point, a representative of the DPUC Staff met with the FCC Staff to urge that position.

The documents portray two adverse parties in this Commission's proceeding effectively conspiring to negotiate away Gemini's position and rights in this docket and dictate the non-resolution of a legal issue fundamental to Gemini's business. In the process, the time, effort and resources of the Commission Staff were trivialized and discarded. Such questionable conduct by the lead telecommunications Commissioner at the DPUC, teaming up with SBC, subverts, undermines and, indeed, may constitute an abuse of, the Commission's processes.

Furthermore, in its previous *ex parte* submissions, Gemini has raised legitimate concerns that the genesis for this surreptitious deal was undisclosed *ex parte* communications between Commissioner Goldberg's Staff and FCC Staff about the substantive outcome of this proceeding. On top of this fact, which Gemini has urged the Commission to investigate, the latest information justifies further inquiry into how the Commissioner Goldberg and SBC sought to manipulate and frustrate the Commission's processes.

Pursuant to Section 1.1206(b) of the Commission's rules, this letter is being electronically filed through the ECFS.

Respectfully submitted,



Paul C. Besozzi  
Counsel for Gemini Networks CT, Inc.

cc: Office of Chairman Martin  
Office of Commissioner Abernathy  
Office of Commissioner Copps  
Office of Commissioner Adelstein  
Office of the General Counsel  
Wireline Competition Bureau

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October 7, 2005

Vanessa Ramirez, Esq.  
Associate Legal Counsel  
Office of the Governor  
210 Capitol Avenue  
Room 212  
Hartford, Connecticut 06106

Re: Follow-Up to Veto of SB 1097

Dear Attorney Ramirez:

As you may recall, the undersigned submitted a letter on behalf of Gemini Networks CT, Inc. directed to your attention on June 10, 2005 concerning potential legal and ethical violations associated with the passage of SB 1097 (P.A. 05-231).

Ultimately, Governor Rell vetoed SB 1097 based on the allegations raised in Gemini's June 10 letter, including the allegation that a memorandum of understanding ("MOU") had been negotiated between SBC and Commissioner Goldberg of the Department of Public Utility Control ("DPUC") wherein, upon passage of SB 1097, the DPUC would reopen and vacate two administrative decisions ordering unbundled access to SBC's abandoned hybrid-fiber coaxial network. At the time, Gemini was pursuing a copy of the MOU through the freedom of information process, but had not received it.

On September 30, 2005, through the freedom of information process, Gemini was finally provided with a copy of the MOU, in addition to several other very disturbing documents. Gemini is including herewith copies of the MOU, a letter of commitment from SBC, and an offer of sale of portions of the hybrid-fiber coaxial network. These documents substantiate every allegation contained in Gemini's June 10, 2005 letter and raise very disturbing questions concerning any action on a telecommunications bill in special session, as well as the continued provision of state-contracted services by SBC, currently one of the state's largest utility contractors.

Vanessa Ramirez, Esq.  
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special session, as well as the continued provision of state-contracted services by SBC, currently one of the state's largest utility contractors.

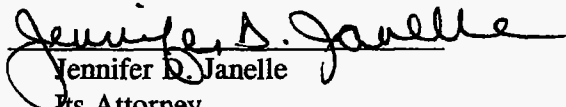
Gemini continues to suffer the repercussions of its disclosure of this questionable conduct, including a recent draft decision from the DPUC purporting to dismiss Gemini's arbitration. Gemini is also aware that SBC continues to lobby for enactment of its special interest legislation in special session, and is actually making headway with the Democratic leadership, as has been reported in today's Hartford Courant.

As Gemini's allegations concerning SB 1097 have been borne out by the freedom of information process and are more than the "ethical McCarthyism" alleged by SBC, it is Gemini's sincere hope that a complete investigation of these matters be performed. It is unconscionable that a state contractor as large as SBC would continue to flout the administrative, judicial and legislative processes in this time of contracting reform.

If Gemini can provide any additional information to the Governor's Office to aid in your assessment of this situation, please do not hesitate to call.

Respectfully yours,

GEMINI NETWORKS CT, INC.

By   
Jennifer D. Janelle  
Its Attorney

c: Attorney General Richard Blumenthal

## DRAFT MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Memorandum") is entered into this \_\_\_\_\_ day of July, 2005, by and between The Southern New England Telephone Company d/b/a SBC Connecticut ("Telco"), a Connecticut corporation, with a place of business at 310 Orange Street, New Haven, Connecticut, and the Connecticut Department of Public Utility Control ("DPUC"), located at Ten Franklin Square, New Britain, Connecticut (sometimes collectively referred to as "Parties").

### WITNESSETH:

WHEREAS, pursuant to SB 1097, *An Act Concerning the Equal Regulation of Telecommunications Services*, as amended, ("SB 1097") a telephone company's hybrid fiber coaxial facilities and hybrid fiber coaxial network are not subject to unbundling.

WHEREAS, pursuant to SB 1097, the DPUC vacated its orders in Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements, dated December 17, 2003, and Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements - Feasibility Determination, August 25, 2004.

WHEREAS, pursuant to SB 1097 and the DPUC's vacature of the orders listed above, the Telco is no longer required to unbundle its hybrid fiber coaxial facilities and hybrid fiber coaxial network or otherwise make such facilities or network available to competitors.

WHEREAS, pursuant to Section 16-247a of the General Statutes of Connecticut, the DPUC is charged with the responsibility to promote the development of effective competition as a means of providing customers with the widest possible choice of services.

WHEREAS, the Telco owns certain coaxial facilities and plant that it is currently not using to provide services but which has value and could be used by a competitive provider to offer telecommunications services.

NOW, THEREFORE, the Telco agrees as follows:

1. The Telco will offer to enter into a commercial agreement with any non-governmental third party to sell its coaxial facilities as described in the attached offer of sale at the terms described therein.
2. The Telco commits to negotiate in good faith with any non-governmental third party, under the terms described in the offer of sale.

3. The Telco will make this offer of sale available to any interested non-governmental third party for a period of twelve (12) months from the date of the execution of this agreement; however, the Telco, in consultation with the DPUC, may agree to extend this offer for an additional year.
4. If during the offer period, a non-governmental third party agrees to the terms in the attached offer of sale, the Telco shall enter into a commercial agreement with that third party pursuant to the terms in the attached offer of sale.

IN WITNESS WHEREOF, the Parties hereto have caused this Memorandum to be duly signed by their authorized representatives.

THE SOUTHERN NEW ENGLAND  
TELEPHONE COMPANY d/b/a  
SBC CONNECTICUT

THE CONNECTICUT DEPARTMENT  
OF PUBLIC UTILITY CONTROL

By: \_\_\_\_\_

By: \_\_\_\_\_

Printed: \_\_\_\_\_

Printed: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_

Date: \_\_\_\_\_

Date: \_\_\_\_\_

## LETTER OF COMMITMENT

The Southern New England Telephone Company d/b/a SBC Connecticut ("SBC Connecticut") commits as follows:

SBC Connecticut recognizes that -

- Pursuant to Section 16-247a of the General Statutes of Connecticut, a goal of the State of Connecticut is to promote the development of effective competition as a means of providing customers with the widest possible choice of services.
- SBC Connecticut owns certain coaxial facilities and plant that it is currently not using to provide services but which has value and could be used by a competitive provider to offer services. Current regulatory rulings impede commercial sale of these facilities.

In the event legislation is enacted finding that a telephone company's hybrid fiber coaxial facilities and network are not subject to unbundling, and as a result of such legislation the Connecticut Department of Public Utility Control ("DPUC") vacates its Decisions in Docket No. 03-01-02, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements, dated December 17, 2003, and Docket No. 03-01-02RE01, Petition of Gemini Networks CT, Inc. for a Declaratory Ruling Regarding The Southern New England Telephone Company's Unbundled Network Elements - Feasibility Determination, August 25, 2004, SBC Connecticut commits to taking the following actions:

- Withdraw SBC Connecticut's federal court appeal, The Southern New England Telephone Company v. the Connecticut Department of Public Utility Control, et al., No. 304CV01675 (RNC).
- Withdraw SBC Connecticut's FCC Emergency Petition, The Southern New England Telephone Company Petition for Declaratory Ruling and Order Preempting the Connecticut Department of Public Utility Control's Decision Directing The Southern New England Telephone Company To Unbundle Its Hybrid Fiber Coaxial Facilities - WC Docket No. 04-30.
- Execute a Memorandum of Understanding committing SBC Connecticut to offer to sell its coaxial facilities as described in the attached Offer of Sale under the terms set forth therein. Said offer would be on an "as is" basis, available to any non-governmental third party willing to agree to the attached terms.

SBC Connecticut will execute the above commitments no later than 5 business days after the vacature of the orders identified above.

THE SOUTHERN NEW ENGLAND  
TELEPHONE COMPANY d/b/a SBC CONNECTICUT

By: \_\_\_\_\_  
Ramona S. Carlow  
Vice President - Regulatory and External Affairs

Dated: \_\_\_\_\_

## **OFFER OF SALE**

The Southern New England Telephone Company d/b/a SBC Connecticut ("SBC Connecticut"), a Connecticut corporation, with a place of business at 310 Orange Street, New Haven, Connecticut, hereby offers to sell certain limited coaxial facilities and plant, never utilized as or part of its telecommunications infrastructure, as more fully described below, to any non-governmental third party that is willing to agree to the terms of this Offer of Sale.

### **I. DESCRIPTION OF COAXIAL FACILITIES FOR SALE**

1. SBC Connecticut owns certain coaxial facilities, which are defined in paragraph 2 below, in twenty six municipalities within the State of Connecticut.

2. The coaxial facilities that are subject to this Offer of Sale are herein defined. The coaxial facilities are limited to and only include(s): (1) the fiber tail, an umbilical piece of fiber optic cable from the optical node to the fiber splice point not more than one hundred feet from the optical node; (2) the optical node(s); (3) coaxial cable and passive devices; (4) associated amplifiers; (5) taps; and (6) supporting strand (hereinafter items 1-6 are referred to as the "Coaxial Facilities"), passing approximately one hundred ninety thousand homes. These Coaxial Facilities were never utilized or otherwise part of SBC Connecticut's telecommunications network or infrastructure.

3. This Offer of Sale of the Coaxial Facilities does not include the following facilities: (1) fiber optic cable beyond the fiber tail (typically described as fiber from the SBC Connecticut central office to the fiber splice point); (2) any fiber optic cable or facilities other than the fiber tail described above; and (3) any coaxial power supplies.

4. Any and all other facilities, plant, equipment, utility poles, networks, or other property, telecommunications or otherwise, owned by SBC Connecticut, not specifically mentioned in paragraph 2 above, are not subject to this Offer of Sale.

5. Said Coaxial Facilities, that are the subject of this Offer of Sale, are located solely in twenty six municipalities (a list of which is attached hereto as Attachment A) passing approximately one hundred ninety thousand households. (The Coaxial Facilities are not necessarily contiguous.)

### **II. CONDITIONS OF SALE OF COAXIAL FACILITIES**

This Offer of Sale is subject to all of the following conditions; removal or modification of any of the following conditions renders this Offer of Sale null and void:

1. The Coaxial Facilities shall be sold on an "as is", "where is" basis, with all faults, and without warranties of any kind, express or implied, including, but not limited to, any implied warranties of merchantability or fitness for a particular purpose.



2. The Buyer shall enter into a commercial agreement to purchase the Coaxial Facilities from SBC Connecticut. The commercial agreement shall not be subject to the Telecommunications Act of 1996.

3. SBC Connecticut shall sell the Coaxial Facilities for the amount of Eight Million Dollars (\$8,000,000), unless there are multiple bidders, at which time SBC Connecticut would sell the Coaxial Facilities based on the offer that provides, in SBC Connecticut's sole discretion, the best value to SBC Connecticut. The Buyer shall pay in full at the time of the execution of this commercial agreement.

4. SBC Connecticut will perform any and all work to separate SBC Connecticut's fiber facilities from where they are lashed or otherwise combined to the existing Coaxial Facilities and will move its fiber facilities to a separate pole attachment. At its sole discretion, SBC Connecticut will place its fiber facilities elsewhere on utility pole.

5. The Buyer shall pay (on a pre-payment basis) SBC Connecticut's charges associated with labor and material to separate SBC Connecticut fiber facilities from where they are lashed or otherwise combined to the existing Coaxial Facilities and SBC Connecticut's charges to move its fiber facilities to a separate pole attachment. Such SBC Connecticut separation charges are not to exceed fifteen million dollars (\$15,000,000).

6. The Buyer shall agree to the following schedule of separation and access to Coaxial Facilities:

- a. Separation and access to the Coaxial Facilities shall occur on a municipal (or town by town) basis;
- b. The Buyer shall apply for Pole Attachment License(s) consistent with separation schedule and the Pole Attachment License Agreement;
- c. SBC Connecticut shall perform separation of its fiber facilities from the Coaxial Facilities and pole line access over a thirty-six (36) month period. During each twelve month period SBC Connecticut shall perform these functions to no more than one third (1/3) of total households passed. (The Buyer shall separately coordinate and schedule in each twelve (12) month period with other public service companies and attachers); and
- d. The Buyer shall commence work to access Coaxial Facilities and pole line only after providing SBC Connecticut one hundred twenty (120) days notice, to allow appropriate time frames for pole licensing and fiber facilities separation.

7. The Buyer shall pay (on a pre-payment basis) for all associated costs and charges to separate SBC Connecticut's fiber facilities from the Coaxial Facilities to the extent the Buyer determines it wishes to utilize the Coaxial Facilities. (The Buyer shall pay separation charges before it builds, upgrades and reactivates the Coaxial facilities on a town by town basis.) The Buyer shall make payment for SBC Connecticut's estimated charges thirty (30) days before SBC Connecticut commences work.

8. The Buyer shall pay SBC Connecticut for SBC Connecticut's "make ready" costs and charges, consistent with SBC Connecticut's Pole Attachment License Agreement, associated with making gain space available to accommodate the separation of SBC Connecticut fiber facilities from the Coaxial Facilities. Such SBC Connecticut specific "make ready" costs and charges are not to exceed five million dollars (\$5,000,000). The term "make ready" in this Offer of Sale is as it is defined in SBC Connecticut's standard Pole Attachment License Agreement.

9. The Buyer shall additionally agree to pay public service companies and other attachers for their respective "make ready" costs and charges, consistent with SBC Connecticut or other public service companies' Pole Attachment License Agreement(s), associated with making gain space available to accommodate the separation of SBC Connecticut fiber facilities from the Coaxial Facilities.

10. The Buyer shall comply with terms and conditions set forth in SBC Connecticut's Pole Attachment License Agreement and all SBC Connecticut processes and procedures in attaching its own facilities to SBC Connecticut or other public service Company utility poles to access the Coaxial Facilities for its own use, including but not limited to the payment of all costs and charges associated with "make ready" and all associated pole attachment fees.

11. This Offer of Sale is available for a one (1) year period commencing August 1, 2005, and the Offer of Sale is withdrawn and otherwise deemed null and void on August 1, 2006.

12. This Offer of Sale is subject to the Buyer and SBC Connecticut ultimately reaching and executing a mutually agreeable commercial agreement.